

Exhibit B

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS

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4 CITIZENS FOR CONSUMER *
JUSTICE, et al *
Plaintiffs, *

5 vs. * CIVIL ACTION
* No. 01-12257-PBS

6 ABBOTT LABORATORIES, *
et al *
7 Defendants. *

8 *****

9 BEFORE THE HONORABLE MARIANNE B. BOWLER
10 UNITED STATES MAGISTRATE JUDGE
11 MOTION HEARING

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23 September 27, 2004

10:30 a.m.

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1 PROCEEDINGS

2 THE COURT: Please be seated.

3 THE CLERK: Today is Monday, September 27,

4 2004. The case of Citizens for Consumer Justice, et al

5 versus Abbot Laboratories, et al. Civil action No.

6 01-12257 will now be heard before this Court.

7 Would counsel please identify themselves for the

8 record.

9 MR. SOBOL: Good morning, Your Honor. Tom

10 Sobol, Hagens Berman, for the plaintiffs.

11 THE COURT: Thank you.

12 MR. KODROFF: Jeffrey Kodroff, Spector,

13 Roseman & Kodroff, also for the plaintiffs.

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12 THE COURT: And when was that filed?

13 MR. SOBOL: That was filed on September 10.

14 And the defendants filed a response --

15 MS. HARRIS: September 20th.

16 MR. SOBOL: -- September 20th.

17 THE COURT: So do we have everyone here?

18 MR. SOBOL: We have everybody here. And I
19 think we are ready to argue. We did try to resolve it. We
20 are not in a position to resolve it. Because it is an
21 emergency motion and involves depositions that are scheduled
22 this week, next week, the week after, the plaintiffs would
23 like to go forward with it. It's docket entry 1015.

24 THE COURT: All right. I have it before me.
25 When was opposition filed?

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1 MR. SCHAU: September 20th, Your Honor.

2 THE COURT: Okay. Docket entry 1062. All
3 right. I will hear you.

4 MR. SOBOL: Thank you, Your Honor.

5 Just to make sure the record is clear, so the
6 motion is 1015. And there is a memo of law regarding it at

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7 1016 and a declaration of my partner Mr. Matt, 1017.

8 The relief that we seek is --

9 THE COURT: I am not familiar, okay. These
10 papers I have not read.

11 MR. SOBOL: You have not read. Okay.

12 The motion seeks protection to limit the amount of
13 third party depositions that can be taken each day and
14 during a week and the amount of notice that needs to be
15 given.

16 The specific relief is that the Court enter an
17 order saying that no more than five third party -- I think
18 it should be nonparty. They're not parties, not third
19 parties.

20 No more than five nonparty depositions can occur in
21 a single week and that no more than two nonparty depositions
22 occur in any one day.

23 And, three, that the Court enforce the 21-day
24 notice requirement for depositions as is set forth in
25 CMR 10.

1 Now, the basis for the motion arises out of
2 essentially the following background.

3 The defendants, as I understand it, have served
4 approximately 150 subpoenas to nonparties in this case.
5 Those nonparties include unnamed class members, wholesalers,
6 pharmacies, multiple different kinds of entities.

7 With respect to depositions -- excuse me -- on
8 absent class members, meaning health plans, that kind of
9 thing, our numbers -- but we're not even sure exactly how
10 many -- about 94 deposition subpoenas have been served on
11 unnamed class members.

12 Now, many of these deposition subpoenas were served
13 months ago but have not been pressed until recently. And as
14 we understand it, and my partner who has been in charge for
15 most of these efforts has set these forth in his
16 declaration, has indicated that there are as many as seven
17 depositions scheduled in a week or something like that.
18 Sometimes more than even two in a day, though I think that's
19 occurred more recently.

20 And that the defendants appear to articulate a need
21 that they need to undertake all of these nonparty
22 depositions before the time that they filed their opposition
23 to the motion for class certification.

24 Now, our position on this is essentially the
25 following:

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1 This court -- it is us one thing to allow robust
2 discovery obviously by a defendant or a group of defendants.
3 But here the number of nonparty subpoenas that these
4 defendants have served shows no conscience whatsoever about
5 how many non-litigants to this litigation they will have to
6 serve with subpoenas in order to obtain what they have to
7 acknowledge is going to be completely cumulative evidence at
8 some point.

9 Now, it is not just these depositions, of course,
10 that are available for the defendants between now and the
11 time the class certification opposition is due.

12 What we have -- we have proffered no restriction
13 with respect to depositions of the parties in the case. The
14 defendants have already scheduled four deposition days with
15 two experts in the case as well that they will get the
16 opportunity to do. You have already heard, you know, other
17 discovery matters and the information that they would have.

18 And so the notion here essentially is to put some

19 kind of limit -- and we are not even asking for a total
20 limit, you know. What we are simply saying is asking to
21 marshal things through, that there has to be some kind of
22 regard to the fact that people have to have an idea about
23 what depositions are going to occur sufficiently in advance.
24 People would ask how many would occur in a day and how many
25 in a week, that kind of thing.

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1 Now, we do have a team of people, it's not as if we
2 have just one person handling it. My partner has
3 administrative responsibility but we have designated five
4 lawyers to help defend depositions or work with absent class
5 members.

6 They're entitled to be educated about the case
7 beforehand. They're entitled to have their own counsel
8 beforehand. And they're entitled to be able to schedule, to
9 have an idea about when these things need to be undertaken.

10 Now, it could be under our proposed limits -- if
11 they're even called "limits" because they're really pretty
12 broad -- that between now and the time the class

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13 certification opposition is due --

14 THE COURT: That date being?

15 MR. SOBOL: I think it's October 28th.

16 MS. HARRIS: 25th.

17 MR. SOBOL: 25th, that there could be about

18 three or four weeks of depositions of nonparties. And under

19 our "limits" they would have about fifteen or twenty

20 depositions under their belt because if they did the maximum

21 of five per week.

22 Now, in addition to that, of course, they'd also be

23 able to take the depositions of our expert and the

24 depositions of the plaintiffs as well.

25 THE COURT: Well, five a week, I mean, are

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1 they complicated depositions? Sometimes depositions, you

2 can do two in a day.

3 MR. SOBOL: Well, we've also suggested doing

4 two in a day as well. But --

5 THE COURT: But that would be ten a week.

6 MR. SOBOL: Right. I mean, at some point, you

7 know, it becomes almost a mechanistic thing, at least from

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8 the defendants' point of view. They have a series of
9 questions they want to ask about how it is that they have
10 reimbursed, they've spent the money on drugs or what they
11 did or didn't meet (ph.). That's what they're trying to do.

12 It's not as if, in other words, that there is going
13 to be a difference if they took frankly, you know, eight of
14 these depositions or eighty of these depositions. They're
15 going to have certain points that they think are ultimately
16 different.

17 It really is, when all is said and done, because
18 they have the power of numbers to be able to do this and to
19 be able to essentially go after a huge number of health
20 plans in the case, they're going to be able to do it,
21 they're essentially trying to pad the argument they're going
22 to make, putting a very significant burden on our time.

23 And each of the specific limits that we have
24 outlined are, you know, intended to, you know, be
25 reasonable. Again, so five depositions, you know, in a

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1 week, no more than two in a day helps marshal resources.

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2 And then the notice requirement is something that
3 Judge Saris had in her order about 21 days ahead of time.
4 It's not just for lawyers to be able to fiddle with their
5 schedule, that kind of thing, but it's also to be able to
6 provide people a reasonable time to educate themselves
7 regarding the issues in the case. Because the defendants'
8 effort obviously is to get certification denied, that would
9 affect the material rights of these deponents, even though
10 they're nonparties.

11 So for those reasons we think that -- we feel that
12 some reasonable restraints on the fact that such a huge
13 number of subpoenas have been sent out without, again, there
14 is no real careful effort to try to say, well, here are
15 really the ten we need or the fifteen that we need.

16 THE COURT: All right. Why shouldn't I allow
17 this motion.

18 MR. SCHAU: Your Honor, my name is Andrew D.
19 Schau. I represent the Johnson & Johnson defendants.

20 And because we weren't originally scheduled, I
21 didn't enter an appearance before so I apologize for that.

22 Your Honor, it is certainly true that we are taking
23 a lot of discovery --

24 THE COURT: You have an appearance in now I

25 take it?

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1 MR. SCHAU: I believe that was my intention.

2 Andy Schau, S-C-H-A-U --

3 THE COURT: We have a form that you have to
4 fill out.

5 MR. SCHAU: I will take care of that. I'm
6 sorry.

7 It is certainly true that we are taking a lot of
8 discovery. And it is absolutely essential that we take that
9 discovery. And it is absolutely false that we are taking
10 more than we need.

11 THE COURT: How many do you need to do between
12 now and the 30th of October?

13 MR. SCHAU: Well, I can assure you that we are
14 not going to be able to get all that we want in.

15 THE COURT: Okay. Let's compromise on a
16 reasonable number here now.

17 MR. SCHAU: Your Honor, it seems to me that if
18 we could take ten a week, that would include some days when
19 we double up, it might even include some days when we have

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20 to triple up, because these things are being set at the
21 behest of the third party --

22 THE COURT: I mean, are they short
23 depositions?

24 MR. SCHAU: They sometimes last a day. They
25 sometimes last considerably less than a day.

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1 The problem, Your Honor, if I could give you a
2 little bit of history here, is we began the process of
3 subpoenaing third parties last October. As soon as we did
4 so, the plaintiffs wrote a letter to the recipients of our
5 subpoenas saying don't respond. We plan to make a motion to
6 protect you from any discovery because you're absent class
7 members.

8 They then made a motion in December before Judge
9 Saris. She didn't decide it until March of 2004 in which
10 case she denied that motion in its entirety and allowed us
11 to go forward.

12 So for four months we pooled arguments. Not only
13 could we not get documents from them because they wrote to

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14 these parties and said don't produce them, but we couldn't
15 even begin the process of trying to get those documents
16 until Judge Saris ruled. So they put us in a huge hole.

17 We now have tried to get documents from third
18 parties, large health plans, people they say are part of
19 their class, people they say are injured.

20 And let's keep in mind the scope of this case, Your
21 Honor. There are dozens of companies who have been sued on
22 hundreds of drugs involving allegedly millions of victims.
23 And they're claiming billions and billions in damages.

24 So I make no apology for the effort we are
25 undertaking to try to defend ourselves in this case.

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1 But I do blame plaintiffs for that four-month
2 delay. And unfortunately Judge Saris set a schedule which
3 is very, very tough on five of us, including the Johnson &
4 Johnson entities. Those track one or fast track defendants
5 have to respond to a class certification motion on
6 October 25th, which if granted will make this case
7 exponentially larger than it would otherwise be.

8 We are willing to work with the plaintiffs and have

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9 worked very hard with the plaintiffs to coordinate this. We
10 exchanged with them each week, and sometimes more often
11 that, a list of the depositions that are coming up. And,
12 Your Honor, they have twenty law firms dedicated to this
13 case.

14 They have decided by themselves to put a much
15 smaller team of lawyers into the defense of this discovery.
16 And when they made this particular motion for protective
17 order, unlike every other motion they filed, they only
18 listed five counsel as being part of representing the
19 plaintiffs' class. They normally list all twenty. I think
20 that was intentional.

21 We have a lot to do. We are working very hard to
22 make it possible and feasible for them to attend every
23 deposition. Sometimes they have attended by telephone.
24 Sometimes they have come in person. But this is a --

25 THE COURT: Where are these depositions being

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1 conducted?

2 MR. SCHAU: They are being conducted at

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3 whatever location of business the third party is at. We are

4 scheduling them at the convenience of the third parties.

5 Not our own and not the plaintiffs.

6 But the plaintiffs' firms reside all over the

7 country. And they have, you know, so some trips are shorter

8 than others. But we are all undergoing the burden of taking

9 these depositions where the third parties are located.

10 THE COURT: So tell me your plan.

11 MR. SCHAU: Your Honor, you're asking me to

12 unilaterally limit the amount of discovery we can take. And

13 I understand that that's what you're asking.

14 THE COURT: I am.

15 MR. SCHAU: That said --

16 THE COURT: Bare bones.

17 MR. SCHAU: It seems to me that ten a week

18 between now and October 25th is not unreasonable. And we

19 will do our best, as we have in the past, to continue to

20 coordinate and provide ample information in advance to the

21 plaintiffs of when those depositions are and where they will

22 take place.

23 THE COURT: And you have no objection to the

24 opposing side appearing by telephone?

25 MR. SCHAU: Absolutely none.

1 THE COURT: That makes it easier.

2 MR. SOBOL: Well, it makes it -- so far what
3 has occurred, of course, is sometimes it might be necessary
4 because you're only given several days' notice and people
5 can't get there is part of the problem.

6 I will say this. I will make a countersuggestion,
7 okay, which I think is reasonable. But as Your Honor can
8 tell, the defendants have essentially just now conceded that
9 this has been an issue that they have been able to go
10 full-bore on since last March.

11 And having waited the spring and waited the summer,
12 and now that we're into the fall, saying we have to do all
13 this all at once is sort of suspect as to whether or not
14 they really need this ten that they say. Because if they
15 really needed it, it's something that would have been done
16 back in March and April and May, June, July and all the rest
17 of that. So you don't know that they really need it.

18 Now, I think that there are, again, there are three
19 issues that are out there. There is how many in the week,
20 how many in the day and how much notice do we get because

21 they can mark up a deposition at the convenience of the
22 deponent and themselves and then we're just told to be
23 there.

24 THE COURT: Okay. Let's talk about notice.

25 MR. SOBOL: Judge Saris has issued an order

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1 saying 21 days. If they have shown good cause why that CMO
2 should not be changed --

3 THE COURT: I mean, that 21 days obviously
4 creates a problem at this point.

5 MR. SCHAU: Sure.

6 The other answer to that, Your Honor, is that the
7 21 day rule applies to, you know, we've given them more than
8 21 days notice of all of these depositions. It's just then
9 you have to actually schedule it. So they know what --

10 THE COURT: Okay. Well, we are down to the
11 wire now. What can you live with?

12 MR. SOBOL: Okay. Ten is way too many for our
13 firm to be able to deal with. If it's something like six a
14 week and we were doing two in a day, we need at least a week

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15 and a half notice because, again, we have to coordinate with
16 these people.

17 It's not a matter of getting people on planes.

18 It's a matter of speaking to their counsel, making sure that
19 they have counsel and making sure that they know what the
20 consequences are of their testimony.

21 THE COURT: Ten a week, seven days' notice.

22 MR. SCHAU: Your Honor, one clarifying
23 question. Does that include the depositions that were
24 scheduled for this week, which would then have to be put
25 off? We would essentially lose a week.

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1 THE COURT: How many are scheduled for this
2 week?

3 MR. SCHAU: I'm not certain of this but I
4 believe it's in the neighborhood of five or six.

5 THE COURT: I am going to let them go forward.
6 Let's make some progress here.

7 MR. SCHAU: Thank you, Your Honor.

8 THE COURT: All right.

9 Now, that leaves us with a hearing date for

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